



ADVOCATES

FOR HIGHWAY
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**Limitations on the Issuance of Commercial Driver's Licenses
with a Hazardous Materials Endorsement, Interim Final Rule,
Request for Comments, 68 FR 23844 *et seq.*, May 5, 2003**

The Federal Motor Carrier Safety Administration (FMCSA) has amended the Federal Motor Carrier Safety Regulations (FMCSR) by means of an interim final rule (IFR) to prohibit the states from issuing, renewing, transferring, or upgrading a commercial driver license (CDL) with a hazardous materials (hazmat) endorsement unless the Transportation Security Administration has first conducted a background records check of the applicant and determined that the applicant does not pose a security risk warranting denial of the hazardous materials endorsement. This interim final rule implements part of Sec. 1012(b) of the Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) and certain other statutory provisions dealing with the transportation of explosives. Pub.L. 107-56 (Oct. 25, 2001).

Advocates agrees with the FMCSA decision to cross-reference and, thereby, incorporate in the FMCSR the U.S. Department of Health and Human Services Centers for Disease Control list of Select Agents and Toxins. Title 42 CFR Pt. 73. This substantially expands the list of hazmat subject to the CDL and other controls issued by regulation and order through the exercise of authority granted the FMCSA by statute and delegation by the Secretary of the U.S. Department of Transportation. However, Advocates already is on record by means of comments filed with the Research and Special Programs Administration (RSPA) strongly disagreeing with its IFR of May 5, 2003, because, among other deficiencies, RSPA has ratified the unchanged continuation of the current regulatory regime governing the types and amounts of hazmat subject to placarding. *See* 68 FR 23832 *et seq.*, May 5, 2003. RSPA considered and improperly rejected application of the more stringent definitions of 'hazmat' used by the Bureau of

Alcohol, Tobacco, and Firearms. That decision, as well as the decision to continue unchanged the pre-September 11, 2001, regulatory system requiring placarding for specific types and quantities of hazmat, was entirely conclusory and without documentation in the rulemaking record that a specific threat assessment of hazmat had been carefully conducted by the agency to support the legitimacy of that decision. Moreover, neither RSPA in the cited regulation nor the FMCSA in the instant IFR cite the unfulfilled statutory mandate for the U.S. Department of Transportation to implement a federal permitting system to control the safety of the transportation of specific hazmat itemized by Congress in 49 U.S.C. § 5109. Both agencies have chronically ignored this statutory requirement that, if implemented, clearly could enhance both the safety and security of hazmat transportation of these specific substances that could be used to mount a threat against the U.S. people, their institutions, and the environment. RSPA is authorized under 49 U.S.C. § 5101 *et seq.* to designate any hazmat, including explosives, as dangerous when transporting it in commerce because it can pose an unreasonable risk to health, safety, or security. Despite this broad authority and heavy responsibility to protect U.S. citizens and institutions against the adverse effects of hazmat in transportation, RSPA has failed to conduct any systematic examination of the types and quantities of hazmat, including explosives, to determine through a public rulemaking action whether the types and/or quantities of hazmat currently subject to placarding need to be changed in order to improve both the safety and security of transporting these substances.

As for the FMCSA decision in the instant IFR “[t]o ensure that each holder of a hazardous materials endorsement for a CDL routinely and uniformly receives a security screening,” the agency adopts a minimum 5-year renewal cycle for a hazmat CDL endorsement. 68 FR 23845. Advocates strongly disagrees with this decision on two grounds. First, this is a long renewal cycle, nearly as long as the longest renewal cycle for an entry-level CDL currently used by state governments. Fundamental changes in a driver’s status, including convictions for felonies and other violations, that both increase the chances of unsafe handling and operating practices by hazmat-endorsed CDL holders as well as heightened potential for threats against the security of the U.S. can occur repeatedly over such a long time frame. Second, the FMCSA has adopted this renewal cycle without a single sentence of explanatory narrative in the entire IFR. The 5-year cycle is a conclusory decision issued by the agency without any examination of its special merits in the rulemaking record, including any exhibition of an agency evaluation of having vetted alternative time periods and what precisely may be the benefits and drawbacks to both safety and security in the transportation of hazmat in the use of such a cycle length as opposed to shorter periods. The choice of a 5-year interval is an arbitrary and capricious decision unsupported by any evidence provided by the FMCSA that this sufficiently enhances the protection of the American people and provides adequate oversight to prevent unscrupulous individuals and organizations from exploiting their access to dangerous hazmat that can be used to mount a threat against the U.S. In this regard, the lack of support in the record for this choice of a 5-year renewal cycle is a

serious legal defect in this regulatory action that could subject the agency to challenge that it has acted arbitrarily and capriciously.

Advocates believes that neither the RSPA nor the FMCSA have sufficiently grasped the need to dramatically increase the stringency of requirements governing the handling, storage, transportation, and operator qualification and oversight necessary to substantially enhance the security of the United States. In addition, both agencies have similarly responded to new security legislation about hazmat transportation without a comprehensive view of the mutual benefits to both transportation safety and domestic security by revising fundamental regulations about CDL issuance and renewal, hazmat types and quantities subject to placarding, or by issuing new requirements, such as the recent, woefully inadequate RSPA action on requiring transporters and offerors of hazmat to have security plans, that will simultaneously improve both safety and security.

Advocates firmly believes that there are few areas of security enhancement of hazmat transportation that would not concomitantly benefit hazmat transportation safety. However, both RSPA and FMCSA have created over the past few years an artificial divorce of security needs from safety needs in highway hazmat transportation that does not serve the interests of the people of the United States.

Respectfully submitted,
ORIGINAL SIGNED
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